(51458)

FILE COPY

Supreme Court, U.S.
FILED
NOV 29 1971
E. ROBERT SEAVER, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-718

PAUL D. MCGINNIS, Commissioner of Correction, State of New York, HARRY FRITZ, Warden, Auburn Prison, Auburn, New York, J. L. CASSCLES, Warden, Ossining Carrectional Facility, Ossining, New York,

*Appellants,*

*against*

JAMES ROYSTER, PERCY RUTHERFORD and all other persons similarly situated,

*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

## JURISDICTIONAL STATEMENT

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
*Attorney for Appellants*
Office & P. O. Address
80 Centre Street
New York, New York 10013

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

MICHAEL COLODNER
Assistant Attorney General
*of Counsel*

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| Jurisdictional Statement | 1 |
| Opinions Below | 1 |
| Jurisdiction | 2 |
| Question Presented | 2 |
| Statute Involved | 2 |
| Statement of the Case | 3 |
| The Statutory Plan | 4 |
| ARGUMENT—This appeal presents substantial questions requiring plenary consideration by this Court | 7 |
| Conclusion | 13 |


### TABLE OF AUTHORITIES

*Cases:*


*Burns* v. *Crouse*, 339 F.2d 883 (10th Cir. 1964) ..... 7

*Dandridge* v. *Williams*, 397 U.S. 471 (1969) .....10, 11

*Douglas* v. *Sigler*, 386 F.2d 684 (8th Cir. 1967) ..... 7

*James* v. *Valtierra*, —— U.S. ——, 28 L.Ed. 2d 678 (1971) ..... 10

*Labine* v. *Vincent*, —— U.S. ——, 28 L.Ed. 2d 288 (1971) .....11, 12

*Lipschitz* v. *State*, 43 N.J. Super. 522, 129 A.2d 466 (1957) ..... 7

*McGowan* v. *Maryland*, 366 U.S. 420 (1961) .....
*Norvell* v. *Illinois*, 373 U.S. 420 (1963) .....
*Palmer* v. *Thompson*, —— U.S. ——, 29 L.Ed. 2d 438 (1971) .....
*Quirke* v. *Beto*, 373 F.2d 739 (5th Cir. 1967) .....
*Sobell* v. *Attorney General*, 400 F.2d 986 (3rd Cir. 1968), *cert. den.* 393 U.S. 940 .....
*Tigner* v. *Texas*, 310 U.S. 141 (1940) .....
*Valcarcel* v. *United States*, 409 F.2d 211 (2d Cir. 1969)

STATUTES

42 U.S.C. § 1983 .....

New York Correction Law:

§ 230(2) .....
§ 230(3) .....1, 2, 3, 4, 5, 6, 7, 10, 11,
§ 230(4) .....
§ 230-a .....
§ 235 .....
§ 803(1) .....
§ 805(1) .....
§ 805(3) .....

New York Penal Law:

§ 70.30(4) .....
§ 70.40(1)(a) .....
§ 70.40(1)(b) .....
§ 2193 .....

OTHER AUTHORITIES


| | PAGE |
|---|---|
| Public Law 380 | 9 |
| 28 U.S.C. § 1253 | 2 |
| 28 U.S.C. § 1343(3) | 3 |
| 28 U.S.C. § 2101(a) | 2 |
| *State-Local Relations in the Criminal Justice System*, Advisory Commission on Intergovernmental Relations, Washington D.C., August, 1971 | 9 |


## APPENDIX


| | PAGE |
|---|---|
| Appendix A, Notice of Appeal Filed November 12, 1971 | 1a |
| Appendix B, Order of District Court Entered October 15, 1971 | 2a |
| Appendix C, Order of District Court | 5a |
| Appendix D, Opinion of the Three Judge District Court | 6a |
| Appendix E, Opinion Convening Three Judge District Court | 23a |
| Appendix F, Affidavit of Deputy Commissioner John R. Cain | 33a |
| Appendix G, New York Correction Law § 230 | 41a |

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

No.

PAUL D. MCGINNIS, Commissioner of Correction, State of New York, HARRY FRITZ, Warden, Auburn Prison, Auburn, New York, J. L. CASSCLES, Warden, Ossining Carrectional Facility, Ossining, New York,

*Appellants,*

*against*

JAMES ROYSTER, PERCY RUTHERFORD and all other persons similarly situated,

*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

## JURISDICTIONAL STATEMENT

This is an appeal from an order of the United States District Court for the Southern District of New York which declared unconstitutional and permanently enjoined the enforcement of Section 230(3) of the New York Correction Law.

### Opinions Below

The opinions of the District Court have not yet been reported. The opinion convening a three-judge court is set

forth as Appendix D, *infra*, pp. 6a-22a. The opinion of the three-judge court is set forth as Appendix E, *infra*, pp. 23a-33a. The order appealed from is reproduced at page 3a.

## Jurisdiction

The order of the District Court was entered on October 15, 1971, and notice of appeal was filed in that Court on November 12, 1971. The jurisdiction of the Supreme Court to review this case on direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101(a).

## Question Presented

Whether that portion of New York Correction Law § 230(3) that allows credit for good behavior to be computed upon the minimum term of an indeterminate sentence less jail time allowance violates the Constitution because it treats prisoners in prisons under the jurisdiction of the State of New York different from defendants in jails awaiting trial and court disposition, such jails being under the jurisdiction of the counties of New York State.

## Statute Involved

Section 230 of the New York Correction Law states in part as follows:

> "3. In the case of a definite sentence prisoner, said reduction shall be computed upon the term of the sentence as imposed by the court, less jail time allowance, and *in the case of an indeterminate sentence prisoner, said reduction shall be computed upon the minimum term of such sentence, less jail time allowance.* No prisoner, however, shall be released under the provisions hereof from a state prison until he shall have served at least one year. In the case of a

COPY BOUND

prisoner confined in a penitentiary, said reduction shall be computed upon the term of the sentence as imposed by the court, including jail time allowance. Subject to the rules of the commissioner of correction, the maximum reduction of ten days in each month may, in the discretion of the board hereinafter provided for, be in whole or in part withheld, forfeited or cancelled, in accordance with the rules of the commissioner of correction for bad conduct, violation of prison rules or failure to perform properly duties assigned." (Emphasis added)

## Statement of the Case

Appellees instituted an action in the District Court under U.S.C. § 1983 and 28 U.S.C. § 1343(3) for judgment eclaring unconstitutional and enjoining the enforcement Section 230(3) of the New York Correction Law relatg to the awarding of credit for good behavior in state risons. The section attacked the awarding of credit for ood behavior on the minimum term of an indeterminate entence without giving good time credit on any pre-trial ncarceration spent in a county jail awaiting trial and disosition on the charge that resulted in that sentence. Apellees alleged that this differentiation between defendants county jails and prisoners in state prisons was invidious iscrimination between those who could and those who ould not post bail prior to trial.

Appellants opposed this application and submitted an ffidavit by Deputy Commissioner of Correction John R. Cain stating that the reason good time is not awarded to ersons in county jails is because the state must be in a osition of supervising and evaluating prisoner behavior n a state program before it awards such good time [Appenix F, p. 36a]. By decision dated January 21, 1971, he District Court granted plaintiffs' application for the onvening of a three-judge court [Appendix D, pp. 23a-33a].

CLOSE IN CENTER

On March 3, 1971, a three-judge court was convened, and by decision filed on August 23, 1971, the court held, 2-1, that Section 230(3) was unconstitutional and permanently enjoined the enforcement of said provision. The majority held that there was no rational basis for the distinction made by that Section between jail and non-jail defendants in the awarding of good time. While conceding that state prisons differed in purpose, usage and availability of facilities from county jails, the majority held that good time was granted primarily as an incentive for good behavior and that the State could adequately fulfill any supervisory needs in awarding this good time through other methods. The dissent stated that it was not wholly arbitrary for the State to allow the Parole Board to have the power to act upon a prisoner's application for parole only after he had spent a fixed proportion of his sentence in a place where his conduct had been under the observation of state prison officials.

The mandate of the District Court was stayed pending final determination by this Court provided that defendants perfected their appeal within 30 days of the entry of the final order. This time limitation was later extended until November 26, 1971.

## The Statutory Plan

Section 230 of the Correction Law (Appendix G) is part of a statutory plan of allowing prisoners to earn "good time" on their sentence while in state prison. Jail time while awaiting trial and disposition is credited to every prisoner who has been in the county jails. New York Penal Law, § 2193. This case concerns only the extra "good time" allowance which is given by statute only for the period that the prisoner is in state prison. Even in cases where time spent in jail before disposition was not credited to a prisoner's sentence, the courts have

COPY BOUN

held that this result "is not sufficiently invidious to reach constitutional proportions." *Valcarcel* v. *United States*, 409 F. 2d 211, 213 (2d Cir. 1969); *Sobell* v. *Attorney General*, 400 F. 2d 986, 990 (3rd Cir. 1968), *cert. den.* 393 U.S. 940.

The system operated by having the Department of Correction calculate a series of release dates, which are given to each prisoner at the time he arrives at state prison. These dates are as follows:

1. *"Minimum parole date"*—a date calculated upon the greatest amount of good time that can be earned against the *maximum* sentence of an indeterminate term under section 230(2) and 230(3) which is the earliest date on which an inmate can be paroled at the *discretion* of the Parole Board.

2. *"Statutory release date"*—a date calculated upon the greatest amount of good time that can be earned against the maximum sentence of an indeterminate term under section 230(4) which is the earliest date on which an inmate *must* be paroled by the Parole Board.

3. *"Maximum expiration date"*—the date of the maximum of a sentence to which an inmate can be held if he receives no good time credit at all.

The date at issue in this action is the "minimum parole date". A prisoner may receive a reduction of his sentence not to exceed 10 days for each month of his minimum term [Section 230(2)]. In reality, however, an inmate does not "earn" this time as each month passes; instead, the greatest possible amount of his good time credit, calculated at one-third of the minimum sentence is deducted from his sentence immediately upon arrival in prison, and the only changes in this allowance occur when

CLOSE IN CENTER

penalties are inflicted (see Section 235). [Thus, a prisoner with a minimum sentence of 3 years would be given a minimum parole date of 2 years, which theoretically could not be "earned" at the rate of 10 days a month or 4 months a year].

The problem in this case is that Section 230(3) directs that this minimum parole date be calculated "less jail time allowance". The Department calculates the date at one-third off the time derived by first subtractiong from the minimum sentence the amount of time spent in jail prior to coming to prison. When this minimum date arrives, the Department of Parole then decides in its discretion whether the inmate should be paroled. No provision for any "good time" allowance for the period prior to confinement in state prison is authorized because by its very nature good time only applies to confinement after conviction.

It should be noted that the District Court took jurisdiction under § 1983 despite the fact that on September 1, 1967, Section 230 of the Correction Law was replaced by Sections 803 and 805 of the Correction Law and Section 70.30 and 70.40 of the new Penal Law, which apply to all convictions had *after* that date. Under the new statutory scheme, good time earned on the minimum sentence is abolished. A prisoner meets with the Parole Board at the expiration of his minimum term regardless of how much good time he has earned or of how much time he spent in jail prior to arriving at state prison [Correction Law, § 805(3), Penal Law § 70.40(1)(a)]. At that meeting, the Parole Board determines in its discretion whether to release the prisoner on parole. Good time is now calculated off the maximum term of the sentence, regardless of jail time [Correction Law, §§ 803(1); 805(1); Penal Law §§ 70.30(4); 70.40(1)(b)].

However, persons imprisoned prior to September 1, 1967 have an opportunity, at any time, to elect to serve

COPY BOUN

eir sentence under the provisions of the new Penal Law d the new chapters of the Correction Law, and so be igible for "conditional release" [Correction Law, 30-a]. If they do not make this election, the old section 0(3) still applies. Both plaintiffs have not elected the w law procedures.

## ARGUMENT

**This appeal presents substantial questions requiring plenary consideration by this Court.**

*By substituting its judgment for that of the New York Legislature, the decision of the three-judge District Court completely ignored the equal protection standards set forth by this Court, and the opinion raises serious questions concerning the role of the federal courts in reviewing the enactments of State Legislatures.*

The distinction made by Section 230(3) of the New York orrection Law is that good time on a state sentence is be awarded on the minimum term of an indeterminate ntence only for time spent under state supervision in a ate prison, and not for the time spent outside of state pervision in a county jail*. This distinction is based on e undisputed fact that state prisons differ from county

*The courts have all held except for the instant case that the ght to earn "good time" credit while in prison is not a federal ght, and that the denial of the applicability of good time to jail me while in the local jail is not the denial of a federal right. ouglas v. *Sigler*, 386 F. 2d 684, 686 (8th Cir. 1967); *Quirke* v. tto, 373 F. 2d 739 (5th Cir. 1967); *Burns* v. *Crouse*, 339 F. 2d 3 (10th Cir. 1964); *Lipschitz* v. *State*, 43 N. J. Super. 522, 129 . 2d 466 (1957).

CLOSE IN CENTER

jails with respect to purpose, usage and availability of facilities**.

State prisons come directly under the supervision of state correction authorities, whereas county jails are supervised by local officials. It is these state authorities who must eventually make the difficult and sensitive decision of whether to release a prisoner into society before he serves his sentence. This requires that close contact be maintained with the prisoner, that uniform standards of evaluation be created and that a suitable program of activity be followed to allow for evaluation [see Appendix F, p. 36a]. State officials have no jurisdiction at all over inmates in county jails who are awaiting trial and, if acquitted or otherwise released, will never even come under the jurisdiction of the state correctional institutions.

These differences allow for different treatment within a constitutional framework. The Constitution does not require that things different in fact be treated in law as though they are the same. *Tigner* v. *Texas,* 310 U.S. 141, 147 (1940).

The majority of the District Court did not challenge the existence of these differences, nor did the Court reject the uncontested allegations of appellants as to the need for state supervision to award good time. What the majority

---

** The state prisons are intended to have rehabilitation as a prime purpose. The facilities at these institutions are built and equipped to serve this purpose. State prisons serve as essentially permanent residences for prisoners as they serve out their sentences. The prisons are thus able to create and maintain long-term educational and vocational services such as schools, factories, job-training programs and related activities. [See affidavit of Deputy Commissioner John R. Cain, Appendix F, p. 36a].

On the other hand, county jails exist solely as detention facilities and serve no other purpose. They are neither equipped nor intended to do anything other than hold people awaiting trial. They maintain no schools, run no factories and require no work from the inmates.

COPY BO

held was that the need for state supervision was not the "primary" reason for the awarding of good time [Appendix D, p. 14a]. It found that the awarding of good time was "primarily" [Appendix D, p. 12a] an incentive for good behavior, and therefore saw no reason why good time could not be awarded for time spent in county jails. The District Court refused to consider the supervisory aspects of good time because the awarding of good time was not based "solely and exclusively" [Appendix D, p. 11a] on the evaluation of a prisoner's performance in a state prison program.* Such reasoning has been condemned by this Court. See *Palmer* v. *Thompson*, —— U.S. ——, 29 L. Ed. 2d 438, 444-45 (decided June 14, 1971).

The majority below has created an equal protection standard that has no basis in any of the decisions by this Court. It has stated in effect that a statutory distinction will be upheld only if it is supported by what it considers to be the primary reason for the making of the distinction.

---

*The persons in the county jails awaiting trials or other disposition are not adjudicated prisoners. They are defendants clothed with the constitutional presumption of innocence. There would be no right or possibility of instituting a work program or engaging in any other program of rehabilitation. They only become prisoners when they have been convicted and sentenced to a state prison. The equation of defendants confined awaiting such disposition with convicted persons is clearly erroneous. Moreover, of course, the State does not supervise the conduct of any of the defendants awaiting such disposition.

The ruling of the District Court is calculated to impose on the State the unprecedented burden of taking over such supervision of every local jail in the State. The problem of determining what branch of government could best administer detention facilities has recently been given deep consideration by the Advisory Commission on Intergovernmental Relations, a national commission established by Act of Congress [Public Law 380], and the Commission recommended that jails and detention facilities continue to be administered by localities, and not by the states. *State-Local Relations in the Criminal Justice System*, Advisory Commission on Intergovernmental Relations, Washington, D. C., August, 1971, pp. 55-56.

ND CLOSE IN CENTER

This is squarely in contradiction to the uniform ruling of this Court that a distinction made by a state statute must be upheld "if *any* state of facts *can conceivably* justify it" (Emphasis added), *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1969); *McGowan* v. *Maryland*, 366 U.S. 420, 426 (1961), and is in conflict with the cases in other circuits which have dealt with the same aspect (*supra*, p. 7 fn.).

It is true that an inmate who serves time in a county jail prior to conviction may meet the Parole Board a few months later than an inmate serving the same sentence who was not incarcerated prior to trial.* However, the fact that a statute might disadvantage a particular class does not mean that it denies equal protection. *James* v. *Valtierra*, —— U.S. ——, 28 L. Ed. 2d 678, 683 (decided April 26, 1971). A statutory distinction must be upheld if it has a rational basis and does not result in invidious discrimination.** *Dandridge* v. *Williams*, *supra*, 397 U.S. at 486.

Appellants presented a clear valid reason for the distinction made in section 230(3)—that since it is the state correction authorities who must ultimately make the sensitive decision of whether to release a prisoner prior to the expiration of his minimum sentence, the granting of good time leading to an earlier minimum release should be based solely on the personal evaluation of a prisoner's conduct by state officials while he is actually confined in their cus-

---

* Plaintiff Royster spent 404 days in jail prior to sentence and thus claims his minimum release date should be set about four months earlier. Plaintiff Rutherford spent 242 days in jail prior to sentence and claims his minimum release date should be set about three months earlier.

** The District Court did not decide whether the discrimination was invidious for any reason other than it lacked a rational basis [see Appendix D, p. 21a, fn. 14].

COPY BOUND

ly. [See Appendix D, p. 15a.]* The majority below
l not contest this reason, but decided that the encourage-
nt of good behavior was a more compelling reason, and
forth alternative ways of how state officials might be
le to fulfill the goal of supervising while awarding good
e on time spent in county jails [Appendix D, pp. 14a-
a]. This is a blatant imposition of the District Court's
n philosophy of penology and is the very judicial activity
rbidden by this Court.

This Court has consistently held that a federal court
nnot strike down a state statute because it has a different
ew as to what would be a wiser statutory scheme. *Dand-
dge* v. *Williams, supra,* 397 U.S. at 485-486. See also
orvell v. *Illinois,* 373 U.S. 420, 424 (1963). As this Court
ost recently stated (*Labine* v. *Vincent,* —— U.S. ——,
3 L. Ed. 2d 288 [decided March 29, 1971]) [28 L. Ed. 2d at
93]:

> "The Federal Constitution does not give this Court the power to overturn the State's choice under the guise of constitutional interpretation because the Justices of this Court believe that they can provide better rules."

---

*The state does grant good time credit for pre-sentence jail
me in the case of the county penitentiary inmate [Section 230(3)]
d in the case of the indeterminate sentence prisoner's statutory
lease date (calculated on the maximum term of the sentence).
Section 230(4)]. In these cases the need for personal supervision
nd evaluation before an inmate is released back into society is not
great—penitentiary inmates are serving terms for less serious
isdemeanors of under one year and the determination of release
n the maximum date of an indeterminate sentence clearly is a less
ensitive decision requiring less evaluation than that of release prior
o the minimum term that a sentencing judge determined was the
ery least amount of time that a convicted felon should serve. The
ajority below did not reject these reasons, but rather pointed out
hat they help to show that the "primary aim" of the statute was
o foster prison discipline [Appendix D, p. 14a].

CLOSE IN CENTER

The court below is not entitled to implement its own conception of penal philosophy by advising the State of New York how it could best implement an alternative statutory scheme and still preserve all of its original goals. As this Court stated in *Labine* v. *Vincent, supra,* [28 L. Ed. at 294]:

> "It may be possible that some of these choices are more 'rational' than the choices [made by the state Legislature]. . . . Absent a specific constitutional guarantee, it is for that legislature, not the life-tenured judges of this Court, to select from among possible laws".

Indeed, much of the reasoning of the majority below attacking the rationality of Section 230(3) is based upon the majority's conception that the supervisory aspect of good time is minimal because the Parole Board would still have the discretion to refuse to release any prisoner who had earned sufficient good time on his minimum sentence [Appendix D, p. 15a]. The court below fails to recognize that the Legislature did not intend that the Parole Board be *allowed* to exercise its discretion until after a prescribed minimum amount of state supervision had elapsed. The majority cannot substitute its own judgment for that of a state legislature as to the criteria by which a state agency should operate. As the dissent correctly indicates, the decision below is based solely "on the judges' convictions that they can administer state prisons more wisely than the state authorities, and not on any compelling constitutional considerations" [Appendix D, p. 22a].

COPY BOUN

## CONCLUSION

The questions presented by this appeal are substantial and of broad public importance. Probable jurisdiction should therefore be noted.

Dated: New York, New York, November 22, 1971.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
*Attorney for Appellants*

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

MICHAEL COLODNER
Assistant Attorney General
*of Counsel*

CLOSE IN CENTER

## Appendix A, Notice of Appeal Filed November 12, 1971.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Paul D. McGinnis, Harry Fritz and J. L. Casscles, defendants in this action, hereby appeal to the Supreme Court of the United States from the final order granting a declaratory judgment and a permanent injunction, entered in this action on October 15, 1971.

This appeal is taken pursuant to 28 U.S.C. § 1253.

LOUIS J. LEFKOWITZ,
Attorney General of the
State of New York,
Attorney for Defendants,
Office & P. O. Address,
80 Centre Street,
New York, New York 10013.

By /s/ MICHAEL COLODNER,
Assistant Attorney General.

## Appendix B, Order of District Court Entered October 15, 1971.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

A complaint having come before the United States District Court, Southern District, brought under 42 U.S.C. § 1983, with federal jurisdiction predicated on 28 U.S.C. § 1343(3), an oral hearing had thereon, on March 3, 1971, before the Honorable Paul R. Hays, United States Circuit Judge, the Honorable Morris E. Lasker, District Judge, and the Honorable Charles M. Metzner, District Judge. After duly considering all of the evidence including the oral argument for plaintiffs and defendants and the memoranda of law submitted thereby, an opinion of the Honorable Morris E. Lasker, United States District Judge, for the Southern District of New York, having been filed on August 23, 1971, declaring (1) that the declaration of a class action, defined to include all prisoners who are presently serving indeterminate sentences in state prison for offenses committed prior to September 1, 1967, who served time in county jail prior to trial and sentence to state prison, who have not yet reached their minimum release program under § 230-a of the Correction Law, is granted; (2) that § 230(3) of the New York Correction Law, insofar as it denies good time credit for jail time to indeterminate sentence prisoners in the computation of their minimum release dates is unconstitutional; and (3) that defendants Paul D. McGinnis, Commissioner of Correction, State of New York, Harry Fritz, Warden, Auburn Prison, Auburn, New York, and J. L. Casscles, Warden, Ossining Correctional Facility, Ossining, New York, be permanently enjoined and restrained from enforcing § 230(3) of the New

COPY BOUN

*Appendix B, Order of District Court*
*Entered October 15, 1971.*

ork Correction Law so as to deny such credit to plaintiffs nd members of their class. It is hereby

ORDERED AND ADJUDGED that § 230(3) of the New York orrection Law, insofar as it denies good time credit for il time to indeterminate sentence prisoners in the comutation of their minimum release dates, is hereby declared nconstitutional, and it is further

ORDERED AND ADJUDGED that the defendants, Paul D. Mcinnis, Commissioner of Correction, State of New York, arry Fritz, Warden, Auburn Prison, Auburn, New York, nd J. L. Casscles, Warden, Ossining Correctional Facility, ssining, New York are permanently enjoined and reained from enforcing § 230(3) of the New York Correcon Law so as to deny good time credit for jail time served county jail prior to trial and sentence to state prison to ndeterminate sentence prisoners in the computation of eir minimum release date, and it is further

ORDERED AND ADJUDGED that the declaration of a class acon is hereby granted, the class defined to include all prisers who are presently serving indeterminate sentences state prison for offenses committed prior to Septemr 1, 1967, who served time in county jail prior to trial nd sentence to state prison, who have not yet reached eir minimum release date, and who have not as yet ected the conditional release program under § 230-a of e Correction Law, and it is further

ORDERED AND ADJUDGED that the mandate of this Court be ayed pending the disposition of defendants' appeal to e United States Supreme Court *provided that* said re-

CLOSE IN CENTER

lief be sought within 30 days of the order granting the stay or within such time as may be granted by the Supreme Court upon application to that Court for a further stay.

Dated: New York, New York, October 12, 1971.

.....
U.S.D.J.

/s/ CHARLES M. METZNER,
U.S.D.J.

/s/ MORRIS E. LASKER,
U.S.D.J.

Although I dissent from the decision of the court in this case, I join in the order as correctly representing that decision.

October 13, 1971.

/s/ PAUL R. HAYS,
U.S.C.J.

Judgment entered 10/15/71.

/s/ JOHN LIVINGSTON,
Clerk.

## Appendix C, Order of District Court.

A complaint having come before the United States District Court, Southern District, brought under 42 U.S.C. §1983 challenging the constitutionality of section 230(3) of the New York Correction Law, and after briefs filed and arguments presented an order having been signed and dated October 14, 1971 declaring said section unconstitutional and permanently enjoining its enforcement, and said order further containing a stay of the mandate of the Court pending the disposition of defendants' appeal to the United States Supreme Court provided that said relief be sought within 30 days of the order granting the stay, and said 30 days being about to expire on November 13, 1971, it is hereby

ORDERED AND ADJUDGED that the mandate of this Court be stayed pending the disposition of defendants' appeal to the United States Supreme Court *provided that* said relief be sought by November 26, 1971 or within such time as may be granted by the Supreme Court upon application to that Court for a further stay.

Dated: New York, New York, November 15, 1971.

/s/ PAUL R. HAYS,
U.S.C.J.

/s/ CHARLES M. METZNER,
U.S.D.J.

/s/ MORRIS E. LASKER,
U.S.D.J.

## Appendix D, Opinion of the Three Judge District Court.

LASKER, D. J.

Two New York State prisoners have brought this class action seeking a declaratory judgment that Section 230(3) of the New York Correction Law, under which their "good time" was computed, is unconstitutional and an injunction against the alleged discriminatory practices pursued by defendants in application of that statute.

Plaintiffs attack the constitutionality of the provision in § 230(3) which denies state prisoners good time credit for the period of their pre-sentence incarceration in county jail. They contend that the denial of such good time credit deprives them of equal protection in violation of the Fourteenth Amendment by discriminating against those prisoners who cannot afford or are not granted bail prior to trial and sentencing.

This suit is brought under 42 U.S.C. § 1983 (the Civil Rights Act), with federal jurisdiction predicated on 28 U.S.C. § 1343(3). By opinion and order dated January 21, 1971, this court, having found that a substantial constitutional question had been raised, granted plaintiff's application to convene a three-judge court. *Royster* v. *McGinnis*, —— F.Supp. —— (S.D.N.Y. January 21, 1971).

Plaintiffs James Royster and Percy Rutherford are inmates of the Auburn and Ossining Correction Facilities, respectively. They bring this action on behalf of themselves and other state prisoners similarly situated who have served terms of incarceration in county jail prior to their transfer to state prison but have not received good time credit therefor. Royster, having been unable to post the requisite bail bond at the time of arrest, served one year, one month and nine days, or 404 days ("jail time"), in the Nassau County Jail prior to his transfer to state prison to serve consecutive five to ten year terms for burglary in the third degree and grand larceny in the first

COPY BOUND

degree. Rutherford also failed to make bail and, as a result, spent eight months and two days, or 242 days ("jail time"), in the Nassau County Jail prior to his trial, sentencing, and receipt in state prison to serve concurrent terms of ten to twenty years for robbery in the first degree and two and one-half to five years for grand larceny in the second degree.

Although plaintiffs did receive *jail time* credit against the terms of their sentences for the period of their county jail incarceration,[1] they did not receive, and under the provisions of § 230(3) were not entitled to receive, any *good behavior time* credit ("good time") for this period of detention served prior to transfer to state prison. Contending that they should have received good time credit for the jail time so served, plaintiffs now seek to compel defendants to recompute their "minimum release dates" (that is, the dates upon which they would first have the right to appear before the Parole Board). They point out, and it is not disputed, that were they to receive good time credit for time spent in county jail between arrest and sentence, they would be entitled to appear before the Parole Board several months (over four months, in Royster's case; nearly three months, in Rutherford's) earlier than they will under the computation required by § 230(3).

There is no doubt that by its express wording Section 230 mandates the denial of good time credit for the time plaintiffs served in county jail awaiting trial and sentencing. Subsection 2 thereof provides that a state prisoner may receive, "for good conduct and efficient and willing performance of duties assigned, a reduction of his sentence not to exceed ten days for each month of the minimum term in the case of an indeterminate sentence . . .,"[2] and subsection 3 states that "in the case of an indeterminate sentence prisoner said reduction shall be computed upon the minimum term of such sentence, *less jail time allowance.*" (em-

CLOSE IN CENTER

phasis added). However, while jail time *is* excluded from the calculation of an indeterminate sentence prisoner's maximum good time allowance for purposes of determining his minimum release (or parole) date under § 230(3), it is *not* excluded from such computation when it comes to setting the same prisoner's "statutory release date" pursuant to subsection 4 of Section 230. The latter date is the earliest date on which an inmate *must* be paroled by the Parole Board and is arrived at by deducting a prisoner's total good time allowance (five days per month) from the *maximum* term of his indeterminate sentence. By contrast, the minimum release date signifies the earliest date on which an inmate *may* be paroled at the discretion of the Parole Board, and it is computed by deducting the prisoner's total good time credit (ten days per month) from the *minimum* term of his indeterminate sentence.

It is significant that the New York courts[3] have construed § 230(4) (which, unlike § 230(3), does not contain the same explicit language denying good time credit for jail time) to require that good time credits earned thereunder be allowed not only for time served in state prison but also for presentence jail time.[4] Similarly, § 230(3) itself provides that in the case of prisoners confined in county penitentiaries,[5] as opposed to those confined in state prisons, good time reductions "shall be computed upon the term of the sentence as imposed by the court, *including jail time allowance.*" (emphasis added).

JURISDICTION

In the earlier opinion of the single district judge convening this three-judge court, *Royster* v. *McGinnis*, supra, the court determined that plaintiffs had stated a cognizable claim under the Civil Rights Act over which the court had

COPY BOUND

jurisdiction, and that the complaint stated a claim upon which relief could be granted. In that opinion substantial reliance was placed, as it is here in the interest of judicial economy, on a prior decision of this court in the case of *Phipps* v. *McGinnis,* —— F.Supp. —— (S.D.N.Y. March 20, 1970), in which the precise question now before this three-judge court was presented.[6] In *Phipps,* as here, defendants claimed that the court lacked jurisdiction because plaintiff's suit, in effect, sought release from prison and, as such, attempted improperly to avoid the exhaustion requirements of 28 U.S.C. § 2254. At this point it need only be reemphasized that where a plaintiff seeks neither release from custody nor redress of alleged civil rights violations incurred in his state criminal proceedings, relief by way of habeas corpus is inappropriate. In the instant action, plaintiffs make no charge of unconstitutional detention resulting from illegalities in their state court trials. Nor is plaintiffs' complete or immediate liberty at stake, for even if plaintiffs were to secure earlier hearings before the Parole Board, the Board would still retain ultimate discretion to refuse them release on parole.[7]

What *is* clearly at stake, however, is the possible deprivation to plaintiffs of rights secured to them by the Constitution, namely, their right to equal treatment under the law, guaranteed by the Fourteenth Amendment. The Civil Rights Act creates a cause of action precisely to relieve such a deprivation, *Monroe* v. *Pape,* 365 U.S. 167 (1961), and state prisoners fall clearly within its protection. *Cooper* v. *Pate,* 378 U.S. 546 (1964); *Wright* v. *McMann,* 387 F.2d 519 (2d Cir. 1967); *Sewell* v. *Pegelow,* 291 F.2d 196 (4th Cir. 1961). Moreover, unlike the federal habeas corpus statute (28 U.S.C. § 2254), the Civil Rights Act, when properly relied upon for federal jurisdiction, does not require the exhaustion of state judicial remedies.

CLOSE IN CENTER

*Wright* v. *McMann*, supra, 387 F.2d at 522-523. Thus, this court has jurisdiction of the issues raised by the complaint herein and may determine the merits.

THE MERIT OF THE COMPLAINT

The burden of plaintiffs' complaint is that Section 230(3) of the Correction Law violates the Fourteenth Amendment because it denies equal protection of the law to those persons who cannot afford to obtain bail (or are not granted bail) between arrest and sentence and so must serve time in jail awaiting judgment. Plaintiffs argue that whereas those fortunate enough to obtain bail prior to sentence are rewarded with a full allowance of good time credit for the entire period which they ultimately spend in custody (in state prison), those defendants (indigent and otherwise) who are jailed between arrest and sentence because of their inability to furnish bail are denied good time credit for the time spent in county jail and must content themselves with the partial measure of credit allotted to them for the period of their state prison confinement alone. Such a difference in treatment between persons sentenced to state prison for like terms of imprisonment smacks of discrimination on its face.

Thus, the real question, and indeed the only question, before the court is whether a rational basis exists for the distinction made by § 230(3) between jail and non-jail defendants in the awarding of good time credit. We find the requisite rationality lacking. It is true that the Equal Protection Clause requires only that "the State's action be rationally based and free from invidious discrimination." *Dandridge* v. *Williams*, 397 U.S. 471, 487 (1969). Indeed, even though a state's practice may be discriminatory and substantially harm those who are the subject of the discrimination, the practice may still be constitu-

tionally permissible if it serves a valid governmental objective. Thus, for example, although the requirement of bail pending trial substantially discriminates against the indigent defendant, such a classification of "jail versus bail" is constitutionally sanctioned by the Eighth Amendment as a reasonable means for insuring a defendant's appearance in court. See, e.g., *Morris* v. *Crumlish*, 239 F.Supp. 498, 500 (E.D. Pa. 1965). Nevertheless, while laws may create such distinctions and classifications, they must be related to the purposes of the law itself, and artificial distinctions not so reasonably related will not be countenanced.

It is defendants' position that state prisons differ from county jails in respect to purpose, usage and availability of facilities and that the exclusion of jail time in the computation of good time is therefore altogether reasonable and proper. They point out that state prisons (unlike county jails, which exist primarily as detention facilities) are designed to serve the additional goal of rehabilitation, and as a result maintain long-term educational and vocational programs (absent from the county jail system) to meet that end. Defendants contend that good time is granted as an incentive to the inmates to participate in these prison rehabilitation programs and that, since county jails are not equipped to provide such services, there is no basis for granting good time for time served therein. If it were clear that the awarding of good time was based solely and exclusively on an evaluation of an inmate's performance in such programs so endemic to the state prison system, the denial of good time for jail time might be understandable; however, this does not appear to be the case. Rather, it seems that the overriding consideration in the granting of good time reductions is the maintenance of prison discipline. Defendants themselves have ob-

served upon the legislature's recognition of good time credit as "an effective disciplinary device" (Defendants' Memorandum, p. 20), and indeed, a New York state court, even though upholding the constitutionality of § 230(3), has stated:

> "The policy underlying the discretionary grant of good time reductions is clear. The attitude and conduct of prisoners should improve if they are offered an incentive for good and productive behaviour while at the same time the fact that reductions can be withheld will inhibit bad conduct." *Perez* v. *Follette*, 58 Misc.2d 319, 321, 295 N.Y.S.2d 231, 233 (Sup.Ct., Dutchess County, 1968); aff'd 31 A.D.2d 600, 295 N.Y.S.2d 608; motion for leave to appeal dismissed as moot, 23 N.Y.2d 737, 296 N.Y.S.2d 569 (1968).

That good time is granted primarily as an incentive for good behavior and as a deterrent to misconduct is demonstrated in other more practical ways as well. Surely the state's argument is undercut when it is realized that a prisoner is immediately and automatically credited with a maximum allowance of good time credit for *future* good behavior at the time his minimum parole date is initially fixed upon his arrival in state prison. In effect, then, a prisoner does not "earn" good time credit as time goes on for exemplary performance in assorted prison programs but rather simply avoids being penalized for bad behavior. Indeed, Section 235[8] expressly provides that good time may be withheld in whole or in part as "punishment for offenses *against the discipline* of the prison or penitentiary" (emphasis added), and that unless credit is so withheld as punishment, the "[r]eduction credited to a prisoner in the first instance, . . . , shall stand as the reduction allowed."

Defendants' position is also undermined by the fact that ie state *does* grant good time credit for pre-sentence jail me both in the case of the county penitentiary inmate nd in the case of the indeterminate sentence prisoner's tatutory release date from state prison.[9] As the convening ourt observed,

> "In both instances jail time is included in the computation of a prisoner's good time allowance despite the fact that the type of activity required of an inmate to earn good time credit in a county penitentiary or in state prison is allegedly vastly different from that which could be required of an individual incarcerated in county jail." *Royster* v. *McGinnis*, supra, —— F.Supp. at ——.

efendants attempt to explain this anomaly by suggesting iat, since release of a state prisoner at the time of his atutory release date (that is, prior to the *maximum* date f his indeterminate sentence) and release of a county enitentiary inmate (that is, one convicted of a non-felony ffense) do not require the Parole Board to make nearly sensitive an evaluation of a prisoner's conduct and otential for early release as it must in deciding to rease a prisoner prior to the expiration of his *minimum* rm set by a sentencing judge, the legislature[10] could asonably decide to grant such prisoners credit for good nduct in county jail regardless of the evaluation time st to the Parole Board as a result thereof.

Whatever the merit in defendants' attempted distinction ee below), the fact remains that state prisoners can be, d, under certain circumstances, are, granted good time edit for jail time for reasons other than as a reward for rticipation in the various rehabilitative programs of the ate prison system. The awarding of good time for jail

time to these two classes of prisoners only reinforces the belief that the legislature's primary aim in enacting the good time statute was to foster and insure the maintenance of prison discipline. If this be the case, as it clearly seems to be, the particular time or place of an inmate's incarceration would be irrelevant to a determination of his maximum good time allowance, for the granting of good time credit for time served *both* before and after sentencing, whether by county jail or state prison authorities, "would serve the greater goal of inducing good behavior by the prisoners throughout the total period of their confinement." *Phipps* v. *McGinnis*, supra, —— F. Supp. at —— (March 20, 1970).

In this regard it should be noted that plaintiffs' requested change in the method of computing good time credit for minimum release could undoubtedly be accomplished without imposing great expense or administrative burden upon the state. County jail officials could simply certify to state prison authorities whether or not a particular prisoner is entitled to good time credit for the time he spent in the county institution. In fact, as the convening court observed earlier, "whatever method is now used by state authorities to compute the good time allowance of a county penitentiary prisoner, or, indeed, of an indeterminate sentence prisoner for purposes of his statutory release, could seemingly be employed here as well." *Royster* v. *McGinnis*, supra, —— F.Supp. at ——.[11]

Thus, while it may be technically true that state officials have no jurisdiction, at least from an administrative point of view, over inmates awaiting trial in county jails, it is grossly unfair that "plaintiffs and other prisoners like them should be made to bear the yoke of unequal and prolonged confinement merely because of the administrative division of labor between county and state prison authori-

ties." *Royster* v. *McGinnis*, supra, —— F.Supp. at ——. Certainly this is all the more so where, as here, county officials are fully able and equipped to help state authorities achieve the *legislative* goal of prisoner discipline at all correctional levels and the *constitutional* goal of equal treatment under the law. In a case such as this, involving the deprivation of rights secured by the Fourteenth Amendment, both state and county institutions must surely be deemed agencies of the same state government. A distinction in the allowance of good time credit cannot rationally be drawn based upon the type of institution in which the incarceration occurs.

Defendants make one further argument for rationality based upon the purported difference in roles between state prison and local jail officials. They contend that, since it is the state (and not the county) correction authorities who must ultimately make the sensitive decision whether to release a prisoner prior to the expiration of his minimum sentence, the granting of good time (which, in turn, leads to an earlier minimum parole date) should be based solely on the personal evaluation of a prisoner's conduct by state officials while he is actually confined in their custody. In other words, good time credit should not be awarded for jail time because it will result in a prisoner being released on parole before state authorities have had an adequate opportunity to pass upon his readiness therefor. Such fears are wholly illusory, however, for the mere granting of good time credit for jail time need not inhibit state officials in any way in the execution of their admittedly delicate duties. The awarding of good time in and of itself in no way compels the Parole Board to release a prisoner before it has had sufficient time to evaluate him and assure itself of his amenability to parole.[12] Indeed, it is quite possible that, even if a prisoner had been under

the careful eye of state prison authorities for the entire period of his incarceration and had earned good time credit throughout such period, the Board might still feel that he should not be released (and, in fact, would not have to release him) at the time of his minimum parole date. Thus, while the Parole Board's actual decision to release a prisoner on parole should certainly be based on adequate personal observation and evaluation by the releasing officials themselves,[13] the mere decision to award a prisoner good time for time spent in county jail need not be so based since the granting of good time (whether for time served in jail *or* prison) is simply not synonymous with actual release from prison—at least in the case of minimum release. Indeed, Section 213 specifically provides that:

> "Discretionary release on parole shall *not* be granted merely as a reward for good conduct or efficient performance of duties assigned in prison, but only if the board of parole is of opinion that there is reasonable probability that, if such prisoner is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society." (emphasis added)

Defendants' final contention—that plaintiffs are really not challenging the good time provisions of § 230 but rather the consequences of the bail system—was fully considered in the opinion of the convening court, and this court adopts those conclusions.[14]

### Class Action

The requirements of Rule 23, Fed.R.Civ.P., having been met, plaintiffs' request for the declaration of a class action is granted. The class which plaintiffs seek to repre-

sent is so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class; the claims of the representative parties are typical of the claims of the class; the representative parties will protect, and in fact have protected, fairly and adequately the interests of the class; and the defendants have acted on grounds generally applicable to the class, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole. That this suit should be maintained as a class action is demonstrated by defendants' own representation that "any final decisions by the federal courts declaring the provision of the statute unconstitutional would be accepted and implemented by the state not only with respect to plaintiffs, but with respect to all prisoners whose time is computed pursuant to the statutory provision" in question. (Defendants' Memorandum, p. 41). Defendants' suggestion (rather inconsistent with the latter representation) that class relief is inappropriate here because "[m]any prisoners no doubt have received sentences which take into account the fact that good time cannot be earned on jail time" (Defendants' Memorandum, p. 41) is without any support in the record and altogether hypothetical. In view of the constitutional deprivation imposed on plaintiffs and their class by § 230(3), this court cannot simply "presume" that any, let alone all, of the numerous sentencing courts involved meticulously adjusted the sentences they imposed to compensate for the statutory denial of good time credit (often of only a few days duration) here declared unconstitutional.

Inasmuch as it would be impracticable and potentially disruptive of prison routine to require that notice be given to class members of plaintiffs' action and the decision herein, and inasmuch as notice is not necessary "for the protection of the members of the class or otherwise for

the fair conduct of the action," Rule 23(d), Fed.R.Civ.P., notice to the members of the class need not be given. Indeed it is difficult to imagine that any member of the class would "opt out" if he were given notice.

In view of the foregoing, § 230(3) of the New York Correction Law, insofar as it denies good time credit for jail time to indeterminate sentence prisoners in the computation of their minimum release dates, is hereby declared unconstitutional, and defendants will be permanently enjoined and restrained from enforcing it so as to deny such credit to plaintiffs and members of their class. The class is defined to include all prisoners who are presently serving indeterminate sentences[18] in state prison for offenses committed prior to September 1, 1967, who served time in county jail prior to trial and sentence to state prison, who have not yet reached their minimum release date, and who have not as yet elected the conditonal release program under § 230-a of the Correction Law.

Submit decree on notice.

Dated: New York, New York, August , 1971.

.....
U.S.C.J.

.....
U.S.D.J.

MORRIS E. LASKER,
U.S.D.J.

FILED

AUG 23, 1971

## *Appendix D, Opinion of the Three Judge District Court.*

[1] See Penal Law, § 2193(1), repealed as of September 1, 1967, but in effect at the time plaintiffs were committed to state prison. Section 2193(1) has been replaced in the new Penal Law by § 70.30(3).

[2] We are here concerned with an "indeterminate sentence," that is, a "sentence to imprisonment in a state prison having minimum and maximum limits fixed by the court." Correction Law, § 230(1).

[3] See *People* v. *Deegan*, 56 Misc. 2d 567, 289 N.Y.S.2d 285 (Sup. Ct., Westchester County, 1968); *Paul* v. *Warden of the Suffolk County Jail* (New York Law Journal, May 21, 1969, at p. 18, col. 6).

[4] For a more extensive analysis of the relationship between §§ 230(3) and (4), as well as the pertinent provisions of the new Penal Law and the new chapters of the Correction Law, see footnote 2 in the opinion of the convening court herein, *Royster* v. *McGinnis*, supra, —— F.Supp. ——. It should be noted, however, that the statutory scheme of § 230, which is the subject of this lawsuit, is no longer the law in New York. On September 1, 1967, § 230 was replaced by §§ 803 and 805 of the Correction Law and §§ 70.30 and 70.40 of the new Penal Law, which sections apply to all convictions for offenses committed *on or after that date* (but not to convictions—as of plaintiffs herein—for offenses committed *prior to* the effective date).

Thus, the scope of this case (and of the proposed class) is necessarily limited, for the challenged statute, § 230(3) of the Correction Law, now applies only to those prisoners who were convicted for offenses committed before September 1, 1967, whose minimum terms have not yet expired, who have not yet met with the Parole Board, and who have not yet elected the "conditional release" program offered by the new law and made available to old law prisoners by § 230-a of the Correction Law. Of these prisoners, a smaller class yet—comprised of those inmates who served time in county jail prior to sentence to state prison—actually feel the effect of § 230(3)'s proscription against good time credit for jail time. Nevertheless, the briefs in this case attest to the continuing effect of that mandate on a substantial number of individuals.

[5] Such penitentiaries are county correctional institutions maintained, in general, for the confinement of persons convicted of non-felony offenses carrying sentences of one year or less.

[6] In *Phipps*, a three-judge court eventually dismissed the case as moot because by that time the plaintiff had already appeared before

the Parole Board for consideration for minimum release. *Phipps* v. *McGinnis*, 69 Civ. 3236 (S.D.N.Y., May 13, 1970). The court, therefore, did not reach the merits.

[7] Plaintiff's loss is nevertheless quite real, for, as stated in *United States ex rel. Campbell* v. *Pate*, 401 F.2d 55, 57 (7th Cir. 1968):

> "What he is losing, . . ., is the possibility that if he appeared before the board he might persuade it to decide in his favor. Of course this loss, in practical, human, terms is serious and involves a chance for at least qualified liberty."

In any event, whatever the value to plaintiffs of this *chance* for qualified liberty, it is hardly the equivalent of actual release from custody and as such is distinguishable from recent decisions of our Court of Appeals, *Rodriguez* v. *McGinnis*, —— F.2d ——, Dkt. No. 34567 (2d Cir., March 16, 1971); United States ex rel. *Katzoff* v. *McGinnis*, —— F.2d ——, Dkt. No. 35300 (2d Cir., March 29, 1971), holding that where release from penal custody is sought, the habeas corpus statute—and not the Civil Rights Act—provides the appropriate remedy and requires the exhaustion of state remedies.

[8] Section 235 (as well as the other provisions of Article 9 of the Correction Law) was repealed as of the 60th day after May 8, 1970, but it and most of the other provisions here relevant continue to apply in cases—such as plaintiffs'—where the sentence involved is for an offense committed prior to September 1, 1967, the effective date of the new Penal Law. See note under § 230, Correction Law (McKinney Supp. 1970).

[9] Indeed, at oral argument, the court was informed that when state prisoners are returned, subsequent to their original transfer to state prison, to county authorities in connection with court appearances on post-trial writs of coram nobis, they are granted good time credit for such jail time as well.

[10] The history of § 230 reveals that, at least with regard to the computation of a prisoner's statutory release date under § 230(4), it was the courts—and not the legislature—which decided that good time credit must be granted for time served in county jail. See the cases cited in footnote 3 above and accompanying text.

[11] Significantly enough, a close reading of the Correction Law suggests that an administrative mechanism for the computation of a state prisoner's good time credit for jail time for purposes of minimum release has long been available to defendants, and that county jail officials themselves have been long accustomed to judg-

ing their own prisoners' eligibility for good time credit under a statutory standard almost identical to that imposed upon state correction authorities by § 230. See Correction Law, §§ 250, 252, now repealed but still applicable in cases where the sentence involved is for an offense commited prior to September 1, 1967, and note under §§ 250-254, Correction Law (McKinney Supp. 1970). Nor would there appear to be any difficulty involved in the transfer of an inmate's *good time* record from county jail to state prison authorities, for county officers have for many years been required to deliver to state authorities, upon a prisoner's commitment and transfer to state prison, very similar records regarding such prisoner's *jail time* credit. See § 2193(1) of the old Penal Law and § 489-a of the Code of Criminal Procedure.

[13] As the convening court noted, "If the Board should feel that there has not been sufficient time for evaluation by state officials of the prisoner's conduct and his potential for early release, it can simply refuse to release him, and, barring an excessive abuse of discretion in this regard, such a sensitive determination would not be subject to judicial review." *Royster* v. *McGinnis*, supra, —— F.Supp. at——.

[14] It is interesting to note that the sensitive decision to release a prisoner on parole is not even made by those correction authorities who have actually had the prisoner under their supervision during the period of his state prison incarceration. Rather, this determination is vested solely within the discretion of the Parole Board under the criteria set forth in § 213 infra. The Department of Correction, by awarding the requisite good time, merely certifies that the particular prisoner is legally *eligible* for parole consideration.

[15] It should be noted that the court has not relied on the indigence of the plaintiffs or their class members in holding § 230(3) to have created an unreasonable classification. The invidious discrimination here is not necessarily between the rich and the poor, but rather between the jailed and the non-jailed. Of course, in reality, the weight of pre-sentence incarceration falls most heavily on the indigent, but it is certainly not reserved for him alone.

[16] The rationale of this decision would appear to apply with equal force to "definite sentence" prisoners—that is, those prisoners sentenced to a "sentence to imprisonment in a state prison for a definite fixed period of time," § 230(1)—who are similarly denied good time credit for jail time by § 230(3). This issue, however, has not been raised in the instant litigation, and such prisoners have therefore been omitted from the class.

*Appendix D, Opinion of the Three Judge District Court.*

Hays, Circuit Judge, dissenting:

If a classification made by a state has some reasonable basis it does not violate the equal protection clause. *Dandridge* v. *Williams*, 397 U.S. 471 (1970).

There seems to me to be a reasonable ground for distinguishing in the award of good time credit between time spent in state prison under the supervision of the state prison authorities and time spent in county jail under the supervision of local authorities. It was surely not wholly arbitrary for the legislature to provide that the Parole Board should have the power to act upon a prisoner's application only after the prisoner has spent a fixed proportion of his sentence in a place where his conduct has been under the observation of state prison officials rather than in a local jail.

Under the guise of applying constitutional principles federal judges are increasingly taking over from the states the administration of state prison systems. In this case, as in a number of others recently decided, the assumption of these new duties appears to be based rather on the judges' conviction that they can administer state prisons more wisely than can the state authorities, and not on any compelling constitutional considerations.

## Appendix E, Opinion Convening Three Judge District Court.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

LASKER, D. J.

Plaintiffs James Royster and Percy Rutherford, New York State prisoners in the Auburn and Ossining Correction Facilities, respectively, bring this class action on behalf of themselves and others similarly situated seeking a declaratory judgment that Section 230(3) of the New York Correction Law, under which their "good time" was computed, is unconstitutional, and for an injunction against the alleged discriminatory practices pursued by defendants in application of that statute.

This suit is brought under 42 U.S.C. § 1983 (the "Civil Rights Act") invoking the jurisdiction of this court pursuant to 28 U.S.C. § 1343(3). Plaintiffs now move for the convocation of a three-judge district court under 28 U.S.C. § 2281, 2284, to consider the allegations of unconstitutionality and enjoin enforcement of the state statute in question.

Plaintiff Royster was indicted by a Nassau County Court grand jury on June 15, 1965. Upon failing to post a $3,000 bail bond (later increased to $7,500 to cover a second indictment), he was remanded to the Nassau County Jail. He was thereafter convicted of burglary in the third degree and grand larceny in the first degree, after a trial by jury, in the Supreme Court, Nassau County. On May 20, 1966, he was sentenced to consecutive sentences of five to ten years on each count, and on May 26, 1966 he was received in state prison. Prior to the latter date, he had spent one year, one month and nine days, or 404 days ("jail time"), in the Nassau County Jail, beginning with the date of his arrest on April 17, 1965.

*Appendix E, Opinion Convening Three Judge District Court.*

Plaintiff Rutherford was indicted on January 25, 1966 by the Nassau County Court grand jury and held in $5,000 bail, which he was not able to post. He was convicted, after a jury trial, in the Supreme Court, Nassau County, and sentenced on November 1, 1966, to concurrent terms of ten to twenty years for robbery in the first degree and two and one-half to five years for grand larceny in the second degree, and a suspended sentence on each of two assault, second degree convictions. By the time he was received in state prison on November 4, 1966, plaintiff Rutherford had spent eight months and two days, or 242 days ("jail time"), in the Nassau County Jail awaiting trial and sentencing.

Although both plaintiffs were entitled to, and did, receive *jail time* credit against the terms of sentence imposed upon them for the period of their incarceration in county jail (Penal Law, § 2193(1)), they did not receive, and under the provisions of Section 230(3) of the Correction Law were not entitled to receive, *good behavior time credit* ("good time credit") for this period of detention served in county jail prior to transfer to state prison.

Plaintiffs contend that if they had received good time credit for the time spent in county jail between arrest and sentence, they would be entitled to appear before the Parole Board several months (in Royster's case, over four months; in Ruthorford's, nearly three months) earlier than they will be under the state's present computation pursuant to the language of Section 230(3). Plaintiffs therefore bring this action to compel defendants to recompute their "minimum release dates" (that is, the dates upon which they would first have the right to appear before the Parole Board), contending that they should receive good time credit for the time served in jail prior to their reception at their respective state prisons. Plaintiffs urge that the

withholding from them of good time credit for the period of their incarceration in county jail deprives them of equal protection of the laws in violation of the Fourteenth Amendment in that such a method of computing good time discriminates against those prisoners who cannot afford or, in some cases, are not even granted, bail while awaiting trial and sentencing.

That Section 230 of the Correction Law sanctions and, indeed, requires the denial of good time credit for the time plaintiffs served in jail seems clear from the face of the statute. Subsection 2 thereof provides that a state prisoner may receive, "for good conduct and efficient and willing performance of duties assigned, a reduction of sentence not to exceed ten days for each month of the minimum term in the case of an indeterminate sentence . . .,"[1] and subsection 3 states that "in the case of an indeterminate sentence prisoner said reduction shall be computed upon the minimum term of such sentence, *less jail time allowance.*" (Emphasis added.) It is on the basis of the statutory formula set forth in these two subsections that an indeterminate sentence prisoner's minimum release (or parole) date is calculated, and it is this method of computation that, plaintiffs claim, deprives them of equal protection of the laws. It should be noted, however, that jail time is *not* excluded from the computation of a prisoner's maximum good time allowance for purposes of determining his "statutory release date" pursuant to subsection 4 of Section 230. This date, which is arrived at by deducting a prisoner's good time allowance from the *maximum* term (not the minimum term, as in the case of the minimum release date) of an indeterminate sentence, is the earliest date on which an inmate *must* be paroled by the Parole Board (unlike the minimum release date, which is the earliest date on which an inmate *can* be paroled at the

discretion of the Parole Board). And the New York courts have construed Section 230(4) (which, unlike Section 230(3), does not contain the same explicit language denying credit for jail time) to require that good time credits earned thereunder be allowed not only for time served in state prison but also for pre-sentence jail time.[2] Similarly, Section 230(3) itself provides that in the case of prisoners confined in county penitentiaries,[3] as opposed to those confined in state prisons, good time reductions "shall be computed upon the term of the sentence as imposed by the court, including *jail time allowance.*" (Emphasis added.)

The issue here raised is identical to the question presented to this court recently in the case of *Phipps* v. *McGinnis*, 69 Civ. 3236 (S.D.N.Y.). In two unreported decisions (which are annexed hereto and are dated March 20, 1970 and April 13, 1970, respectively), I found that plaintiff had stated a cognizable claim under the Civil Rights Act and that this court had jurisdiction thereof, that the complaint (which was substantially similar to the one here in issue) stated a claim upon which relief could be granted, and, finally, that a substantial constitutional question had been raised requiring the convening of the three-judge district court.[4] I still adhere to these views, and, in the interest of brevity, reference is made without further comment to the earlier opinions.

Inasmuch as the state has adduced substantially more authority in support of its position in these cases than it did at the time of the *Phipps* case, however, a comment is in order on the several bases now suggested by defendants for upholding the rationality of the distinction made by Section 230(3) between jail and non-jail defendants with regard to the awarding of good time credit.

Defendants contend that since county jails and state prisons differ in both their intended goals and available

facilities, the deduction of jail time in determining good time is eminently reasonable and logical. Whereas, defendants claim, state correctional facilities are designed to serve a three-fold purpose of imposing punishment, protecting society and, most importantly, rehabilitating the inmate, county jails exist primarily as detention facilities to restrict prisoners awaiting trial. Similarly, defendants argue, whereas the facilities in state prisons are equipped to provide long-term educational and vocational programs with good time granted as an incentive to the inmates to participate in these programs, county jails are not equipped to provide such services and consequently there is no opportunity to evaluate an inmate's performance, nor need to encourage his participation, in such programs. Nevertheless, defendants acknowledge that the overriding consideration in the granting of good time reductions is the maintenance of prison discipline. (Defendants' Memorandum of Law, dated November 9, 1970, at p. 15). Indeed, a New York state court which upheld the constitutionality of Section 230(3) has stated:

> "The policy underlying the discretionary grant of good time reductions is clear. The attitude and conduct of prisoners should improve if they are offered an incentive for good and productive behavior while at the same time the fact that reductions can be withheld will inhibit bad conduct." *Perez* v. *Follette*, 58 Misc.2d 319, 321, 295 N.Y.S.2d 231, 233 (Sup. Ct., Dutchess County, 1968); aff'd 31 A.D.2d 600, 295 N.Y.S.2d 608; motion for leave to appeal dismissed as moot, 23 N.Y.2d 737, 296 N.Y.S.2d 569 (1968).

If the legislative purpose of this statute was, as it clearly seems to have been, to encourage good conduct on the part of prisoners, the particular time or place of their incarcera-

tion would not appear to be a relevant consideration. Rather, "it would seem that awarding good time credit for time served *both* before and after sentencing, whether by jail or prison authorities, would serve the greater goal of inducing good behavior by the prisoners throughout the total period of their confinement." *Phipps* v. *McGinnis*, supra, 69 Civ. 3236 (S.D.N.Y. March 20, 1970, at p. 9). In addition, even assuming as true the asserted disparity in goals and facilities between the two types of institutions, the state itself apparently experiences little difficulty in granting good time credit for pre-sentence jail time both in the case of the county penitentiary inmate and in the case of the indeterminate sentence prisoner's statutory release date from state prison. In both instances jail time is included in the computation of a prisoner's good time allowance despite the fact that the type of activity required of an inmate to earn good time credit in a county penitentiary or in state prison is allegedly vastly different from that which could be required of an individual incarcerated in county jail. Finally, it should be noted that plaintiffs' requested change in the method of good time computation for purposes of minimum release could probably be implemented without major difficulty simply by having county jail authorities certify at the time of a prisoner's receipt in state prison whether or not he is entitled to good time credit for the time he passed in county jail. In fact, whatever method is now used by state authorities to compute the good time allowance of a county penitentiary prisoner, or, indeed, of an indeterminate sentence prisoner for purposes of his statutory release, could seemingly be employed here as well. It would not appear equitable that plaintiffs and other prisoners like them should be made to bear the yoke of unequal and prolonged confinement merely because of the administrative division of labor between county and state prison authorities.

Defendants also argue that, since county jails are supervised by local officials and not, like state prisons, by state correction authorities, and since it is these state officials who must eventually make the sensitive decision whether to release a prisoner prior to the expiration of his minimum sentence or not, the granting of good time (which, in turn, determines a prisoner's minimum parole date) should be made only on the basis of personal observation and evaluation of the prisoner's conduct by state officials while he is actually confined in their custody in state prison. But this difficulty, if real, can be easily overcome. If the Board should feel that there has not been sufficient time for evaluation by state officials of the prisoner's conduct and his potential for early release, it can simply refuse to release him, and, barring an excessive abuse of discretion in this regard, such a sensitive determination would not be subject to judicial review. Thus, the very fact that the Board *can* exercise such broad discretion in determining whether to release a prisoner on parole at the time of his minimum release date would seem to compensate for whatever evaluation time may be lost to the Board during the period of a prisoner's county jail incarceration.

Moreover, it would probably often be the case, as it is with regard to the two named plaintiffs herein, that, even with the allowance of good time credit for jail time, the amount of time available to the Parole Board for observation and evaluation of a particular prisoner while in state prison would be only minimally reduced. From the prisoner's point of view, on the other hand, even such a minimal reduction in his time served would surely be of great consequence to him. In plaintiff Rutherford's case, for example, if he were to receive good time credit for the time he spent in county jail prior to sentence, he would spend five years, 11 months and 28 days in state prison (plus eight months and 2 days in county jail) before be-

coming eligible to meet the Parole Board, whereas under the state's present computation he will have to spend six years, two months and 19 days in state prison (plus the eight months and two days in county jail) before he can meet the Parole Board. While the additional two and one-half months in state prison would probably add precious little to the sum of the Parol Board's knowledge of plaintiff after nearly six years of observation and evaluation, the possibility of gaining his freedom some 81 days earlier would undoubtedly be a matter of great moment to plaintiff Rutherford and other imprisoned men like him.

Finally, defendants contend that plaintiffs are not really challenging the good time provisions of Section 230, but rather are attacking the consequences of the bail system. Defendants argue that, while there is an obvious difference in treatment between those free on bail and those in custody for failure to make bail, such a classification of "jail versus bail" is a constitutionally permissible one expressly provided for by the Eighth Amendment, and the consequences of such a classification cannot be deemed to constitute invidious discrimination. I do not disagree with this proposition; however, I have serious doubts as to whether it meets the issue at hand. Defendants rely heavily on *Rigney* v. *Hendrick*, 355 F.2d 710 (3d Cir. 1965), cert. denied 384 U.S. 975, where a defendant who was unable to post bail was, while in jail, placed in a line-up that subsequently led to his identification by a victim of another crime. In rejecting his claim of a denial of equal protection, the Third Circuit stated, at 715:

> "Here we cannot find an invidious discrimination for the different methods employed by the police in securing the identification of a suspected criminal are made necessary because of the difference in circumstances in which those free on bail and those detained find

themselves. Admittedly, there is a classification between those who can and those who cannot make bail. The Constitution, however, permits such a classification and any differences here arise solely because of *the inherent characteristics of confinement* and cannot constitute invidious discrimination." (Emphasis added.)

The real question, then, is whether or not the denial of good time credit for jail time is an "inherent characteristic of confinement." While it follows naturally that certain rights, such as "the right of privacy, to earn a livelihood, to vote, to speak freely, to associate with persons of one's choosing," *Morris* v. *Crumlish*, 239 F.Supp. 498, 500 (E.D.Pa. 1965), must be denied to unbailed defendants as a necessary consequence of their confinement, I do not believe that it follows that denial of good time credit is in any way an "inherent characteristic of confinement." Rather, the grant or denial of good time would seem to be a wholly independent creature of statute. Surely the purpose of the Eighth Amendment—to insure, by bail or, for want of that, by pre-trial incarceration, the defendant's appearance in court—would be equally well served whether or not good time credit were subsequently granted for jail time. Thus, it would appear that "while such distinctions *are necessitated by confinement* while awaiting trial may be made between those who supply bail and those who cannot," *Rigney* v. *Hendrick*, supra, 355 F.2d at 716-717 (dissenting opinion, Freedman, J.) (emphasis added), the unequal denial of good time credit for jail time required by Section 230(3) is not inherently related to such confinement and may well constitute an invidious discrimination.

In any event, as Judge Friendly recently noted, "[t]he issue here is not whether [the state statute] is unconstitutional but whether plaintiffs' claim of unconstitutionality

[is] unsubstantial 'either because it is obviously without merit or because its unsoundness so clearly results from the previous decisions of this court [the Supreme Court] as to foreclose the subject.' " *Latham* v. *Tynan*, —— F.2d —— (2d Cir., decided December 16, 1970, Docket No. 34668, at 850) (dissenting opinion). Plaintiffs' claim herein meets this test of substantiality.

Accordingly, plaintiffs' application for the convening of a three-judge court is granted.

It is so ordered.

Dated: New York, New York, January 21, 1971.

MORRIS E. LASKER,
U.S.D.J.

FOOTNOTES

[1] We are here dealing with an "indeterminate sentence," that is, a "sentence to imprisonment in a state prison having minimum and maximum limits fixed by the court." Correction Law, § 230(1).

[2] Under § 230(4) the statutory release date is set at the rate of five days off per month (as opposed to 10 days in the case of the minimum release date), or one-sixth of the maximum expiration date (that is, the maximum date of a sentence to which an inmate can be held if he receives no good time credit whatsoever, either for the time served in jail or prison).

It should be noted that the statutory scheme of § 230, which is the subject of this lawsuit, is no longer the law in New York. On September 1, 1967, § 230 was replaced by §§ 803 and 805 of the Correction Law and §§ 70.30 and 70.40 of the new Penal Law, which sections apply to all convictions for offenses committed *on or after that date* (but not to convictions—as of plaintiffs herein—for offenses committed *prior* to the effective date). Significantly, under the new statutory scheme, good time earned on the minimum sentence is abolished altogether, thus removing any question of unequal treatment. An inmate meets with the Parole Board at the expiration of his minimum term regardless of how much good time credit he has earned against his maximum sentence or of how much time he spent in county jail prior to his

receipt in state prison. Correction Law, § 805(3); Penal Law, § 70.40(1)(a). Thus, good time is now credited solely against the maximum term of an indeterminate sentence, and it is awarded without regard to whether a prisoner has served time in county jail prior to sentencing. Correction Law, §§ 803(1), 805(1); Penal Law, §§ 70.30(4), 70.40(1)(b). This calculation is identical to that made formerly pursuant to § 230(4), except that a prisoner may now earn 10 rather than 5 days good time credit per month against his maximum sentence. This computation results in the Department of Correction setting, upon a prisoner's arrival at state prison, a "conditional release date" of one-third off the maximum sentence. As in the case of the statutory release date under § 230(4), a prisoner must automatically be released (if he has not in the interim incurred any penalties which have reduced his good time allowance) upon reaching his conditional release date. In addition, any person covered by § 230(4) of the old Correction Law by reason of having commited the offense for which he was convicted prior to September 1, 1967 is entitled, at any time, to elect to serve his sentence under the provisions of the new Penal Law and the new chapters of the Correction Law, and so be eligible for "conditional release." Correction Law, § 230-a. Neither of the named plaintiffs has as yet made this election, presumably because it would foreclose them from receiving any good time credit whatsoever (either for prison time alone, or, as they now request, for both prison and jail time together) off of their minimum sentences and thus compel them to await the full expiration of their minimum terms before appearing before the Parole Board.

Thus, the scope of this case (and of any proposed class) is necessarily limited, for the challenged statute, § 230(3) of the Correction Law, now applies only to those prisoners who were convicted for offenses committed before Sepember 1, 1967, whose minimum terms have not yet expired, who have not yet met the Parole Board, and who have not as yet elected the conditional release program under § 230-a. Nevertheless, the very existence of the issue in this case attests to the continuing presence and effect of § 230(3).

[3] Such penitentiaries are county correctional institutions maintained, in general, for the confinement of persons convicted of non-felony offenses carrying sentences of one year or less.

[4] In *Phipps*, the three-judge court eventually dismissed the case as moot because by that time the plaintiff had already appeared before the Parole Board for consideration for minimum release. *Phipps* v. *McGinnis*, 69 Civ. 3236 (S.D.N.Y. May 13, 1970). The court, therefore, did not reach the merits of the case.

## Appendix F, Affidavit of Deputy Commissioner John R. Cain.

STATE OF NEW YORK }
COUNTY OF ALBANY } ss.:

JOHN R. CAIN, being duly sworn, deposes and says:

I am a Deputy Commissioner in the Department of Correction and make this affidavit in connection with the computation of time in the case of Percy Rutherford, Ossining Correctional Facility #138399.

Section 230 of the New York Correction Law provides that a state prisoner may receive "for good conduct and efficient and willing performance of duties assigned", a reduction in sentence. This credit is generally referred to as "good time".

The statute provides that with respect to inmates of facilities serving an indeterminate sentence the reduction in time "shall be computed upon the minimum term of such sentence, less jail time allowance". In accordance with this statute the computation of an inmate's "good time" is made beginning with his receipt in the facility. According to the records of the Department of Correction of the State of New York, the computation of Mr. Rutherford's sentence is as follows:

*Appendix F, Affidavit of Deputy Commissioner John R. Cain.*

Re: Percy Rutherford
SS-138399

Robbery 1st 10—0—0/20—0—0
Grand Larceny 2nd— 2—6—0/5 —0—0 concurrent

10— 0— 0 Minimum Term
8— 2 Jail Time

9— 3—28 Minimum less jail time
3— 1— 9 compensation earned

6— 2—19 Term less compensation
66—11— 4 Date Received

73— 1—22 Minimum date

20— 0— 0 Maximum Term
8— 2 Jail Time

19— 3—28 Balance
66—11— 4 Date Received

86— 3— 1 Maximum Expiration date
6— 8— 0 Time Earned

79— 7— 1 Conditional Release Date

86— 3— 1 Maximum Expiration date
3— 4— 0 Time Earned

82—11— 1 Statutory Release Date

*Appendix F, Affidavit of Deputy Commissioner John R. Cain.*

The actual allowance of "good time" is discretionary and is awarded as an incentive for good conduct. It is a means for encouraging participation in programs, efficient work and discipline.

The state correctional system seeks to encourage rehabilitation by work participation by inmates, job training programs and education programs. An inmate can be evaluated in his work and participation in the facility's programs and "good time" granted as an incentive. Prior to being received in the facility, however, an inmate who is in jail is not under the supervision of the State Correction Department and is not involved in the facility program. Since the inmate is not participating in the state programs while in jail there is no opportunity to evaluate him nor need to encourage his participation.

Our facilities are part of the state correction facilities and serve a three-fold capacity with respect to convicted prisoners: They provide the means of imposing the punishment or sentence imposed by the Court; they serve to protect society by segregating and restraining the individual; and they attempt to rehabilitate the inmate. Jails on the other hand serve to provide only the purpose of restricting a prisoner prior to his conviction.

For the reasons mentioned above, the deduction of jail time in determining "good time" is reasonable and logical:

1. Jail and correctional facilities and purposes are different.
2. "Good time" is awarded as an incentive to inmates participating in the State Correction system and under its supervision.

In the computation of the term of Mr. Rutherford, his maximum release date is shown as is his statutory release

*Appendix F, Affidavit of Deputy Commissioner John R. Cain.*

date and his conditional release date. To the present time, Mr. Rutherford has not requested consideration for conditional release.

WHEREFORE, it is respectfully requested that the complaint herein be dismissed.

(Sworn to by John R. Cain, October 23, 1970.)

STATE OF NEW YORK }
COUNTY OF ALBANY } ss.:

JOHN R. CAIN, being duly sworn, deposes and says:

I am a Deputy Commissioner in the Department of Correction and make this affidavit in connection with the computation of time in the case of James Royster, Auburn Correction Facility #59875.

Section 230 of the New York Correction Law provides that a state prisoner may receive "for good conduct and efficient and willing performance of duties assigned", a reduction in sentence. This credit is generally referred to as "good time".

The statute provides that with respect to inmates of facilities serving an indeterminate sentence the reduction in time "shall be computed upon the minimum term of such sentence, less jail time allowance". In accordance with this statute the computation of an inmate's "good time" is made beginning with his receipt in the facility. According to the records of the Department of Correction of the State of New York, the computation of Mr. Royster's sentence is as follows:

UND CLOSE IN CENTER

*Appendix F, Affidavit of Deputy Commissioner John R. Cain.*

RE: James Royster, #59875
DCI-971581-X

The calculation of the subject's sentences is as follows:

BURGLARY 3RD

| | *Minimum* | *Maximum* |
|---|---|---|
| Sentence | 5— 0— 0 | 10— 0— 0 |
| Jail Time | 1— 1— 9 | 1— 1— 9 |
| Term less jail time | 3—10—21 | 8—10—21 |
| Possible good time | 1— 3—17 | |
| Term less good time | 2— 7— 4 | |

GRAND LARCENY 1ST

| | | |
|---|---|---|
| Sentence | 5— 0— 0 | 10— 0— 0 |
| Jail Time | 1— 1— 9 | 1— 1— 9 |
| Term less jail time | 3—10—21 | 8—10—21 |
| Possible good time | 1— 3—17 | |
| Term less good time | 2— 7— 4 | |

COMBINED CONSECUTIVE SENTENCES

| | | | |
|---|---|---|---|
| Burglary 3rd | 2— 7— 4 | 8—10—21 | |
| Grand Larceny 1st | 2— 7— 4 | 8—10—21 | |
| Combined term | 5— 2— 8 | 17— 9—12 | |
| Received in prison | 1966— 5—26 | 1966— 5—26 | |
| Minimum parole date | 1971— 8— 3 | 1984— 3— 7 | Maximum expiratio |
| | | 6— 8— 0 | |
| | | 1977— 7— 7 | Conditional Relea |
| | | 1984— 3— 7 | Maximum expiratio |
| | | 3— 4— 0 | |
| | | 1980—11— 7 | Statutory Relea |

*Appendix F, Affidavit of Deputy Commissioner John R. Cain.*

The actual allowance of "good time" is discretionary and is awarded as an incentive for good conduct. It is a means for encouraging participation in programs, efficient work and discipline.

The state correctional system seeks to encourage rehabilitation by work participation by inmates, job training programs and education programs. An inmate can be evaluated in his work and participation in the facility's programs and "good time" granted as an incentive. Prior to being received in the facility, however, an inmate who is in jail is not under the supervision of the State Correction Department and is not involved in the facility program. Since the inmate is not participating in the state programs while in jail there is no opportunity to evaluate him nor need to encourage his participation.

Our facilities are part of the state correction facilities and serve a three-fold capacity with respect to convicted prisoners: They provide the means of imposing the punishment or sentence imposed by the Court; they serve to protect society by segregating and restraining the individual; and they attempt to rehabilitate the inmate. Jails on the other hand serve to provide only the purpose of restricting a prisoner prior to his conviction.

For the reasons mentioned above, the deduction of jail time in determining "good time" is reasonable and logical:

1. Jail and correctional facilities and purposes are different.

2. "Good time" is awarded as an incentive to inmates participating in the State Correction system and under its supervision.

In the computation of the term of Mr. Royster, his maximum release date is shown as is his statutory release

date and his conditional release date. To the present time, Mr. Royster has not requested consideration for conditional release.

WHEREFORE, it is respectfully requested that the complaint herein be dismissed.

(Sworn to by John R. Cain, October 23, 1970.)

## Appendix G, New York Correction Law § 230.

New York Correction Law § 230:

"§ 230. Definite sentence; indeterminate sentence; discretionary reduction of sentence. 1. A sentence to imprisonment in a state prison for a definite fixed period of time is a definite sentence. A sentence to imprisonment in a state prison having minimum and maximum limits fixed by the court or the governor is an indeterminate sentence.

2. Every prisoner confined in a state prison or penitentiary, except a prisoner sentenced for an indeterminate term having a minimum of one day and a maximum of his natural life, may receive, for good conduct and efficient and willing performance of duties assigned, a reduction of his sentence not to exceed ten days for each month of the minimum term in the case of an indeterminate sentence, or of the term as imposed by the court in the case of a definite sentence. The maximum reduction allowable under this provision shall be four months per year, but nothing herein contained shall be construed to confer any right whatsoever upon any prisoner to demand or require the whole or any part of such reduction.

3. In the case of a definite sentence prisoner, said reduction shall be computed upon the term of the sentence as imposed by the court, less jail time allowance, and in the case of an indeterminate sentence prisoner, said reduction shall be computed upon the minimum term of such sentence, less jail time allowance. No prisoner, however, shall be released under the provisions hereof from a state prison until he shall have served at least one year. In the case of a prisoner confined in a penitentiary, said reduction shall be computed upon the term of the sentence as imposed by

the court, including jail time allowance. Subject to the rules of the commissioner of correction, the maximum reduction of ten days in each month may, in the discretion of the board hereinafter provided for, be in whole or in part withheld, forfeited or cancelled, in accordance with the rules of the commissioner of correction for bad conduct, violation of prison rules or failure to perform properly duties assigned.

4. Every prisoner confined in an institution under the jurisdiction of the state department of correction for an indeterminate term, except a prisoner sentenced for a term having a maximum of natural life, may receive, for good conduct and efficient and willing performance of duties assigned a reduction of his sentence not to exceed two days for each month of the maximum term. For meritorious progress and achievement in a treatment program to which he has been assigned, following appropriate testing and classification such prisoner may also receive a reduction of his sentence not to exceed three additional days for each month of the maximum term. In no event, however, shall the maximum reduction allowable under this subdivision exceed two months for each year of the maximum sentence, nor shall any such reduction be calculated under this subdivision to reduce the time actually served to a term less than the minimum sentence imposed by the court. The reduction of sentence provided for in this subdivision, or any part thereof, may be granted, withheld, forfeited or restored subject to rules and regulations which the commissioner of correction is hereby authorized to promulgate and enforce, and such rules and regulations may include special provisions for the allowance of such reduction in the case of a prisoner who is an

invalid or physically or mentally disabled who requests to be enrolled in a treatment program and performs to the limit of his capacity. But all reduction of sentence provided for in this subdivision which is received by a prisoner prior to any release on parole, including release pursuant to this subdivision, shall be forfeited and shall not be restored if the paroled prisoner is returned to an institution under the jurisdiction of the department either for violation of parole or by reason of a conviction for a crime committed while on parole. A paroled prisoner who is so returned may earn a reduction pursuant to this subdivision after his return, calculated only on the remaining portion of the maximum term of the sentence. Nothing contained herein shall be construed to confer upon any prisoner the right to demand or require any reduction of maximum sentence. Every prisoner who is released prior to the expiration of his maximum sentence pursuant to this subdivision shall remain under the supervision of the board of parole for the full term of the maximum sentence imposed by the court and the procedure and terms and conditions applicable to such release shall be the same as those provided in this article for the release and parole of a prisoner who is not otherwise subject to the jurisdiction of the parole board.

5. Nothing contained in this section shall be construed to confer upon any prisoner the right to demand or require the restoration of any reduction of sentence heretofore forfeited or withheld by the commissioner of correction. A monthly account showing any reduction of sentence that has been credited to each prisoner pursuant to this section shall be kept by the warden in suitable books or records.

*Appendix G, New York Correction Law § 230.*

Section 230 is implemented by Sections 234, 235 and 23
of the New York Correction Law, which state as follows:

"§ 234. Rules for allowance of reduction of sen-
tence.— The commissioner of correction shall form-
ulate rules governing the allowance or disallowance
of reductions to prisoners for good conduct and for
efficient and willing performance of duties assigned
to them in prison or penitentiary. All such rules shall
in all cases be strictly adhered to in all the prisons
and penitentiaries in this state. These rules may be
changed from time to time, if necessary, in the dis-
cretion of the commissioner of correction, and he shall
immediately upon their adoption or upon any change
in the same thereafter, cause copies of the same to
be forwarded to the wardens and superintendents of
all the state correctional institutions and the wardens
or superintendents of all the penitentiaries in this
state. A copy of these rules shall be furnished to
every prisoner entitled to the benefits of this article.

§ 235. Determination of reduction of sentence.—
For the purpose of applying the rules mentioned in
the last section for the allowance or disallowance
under the provisions of this article of reduction for
the good conduct of any prisoner, and for efficient
and willing performance of duties assigned, a board
shall be constituted in each of the prisons of this
state, to consist of the warden, the principal keeper
the physician and the officer in charge of industries
therein and, in each of the penitentiaries of this state
the warden or superintendent, the deputy or principal
keeper and the physician therein, or of the persons
acting in their place and stead. This board shall
meet once in each month before the date fixed for the
transmission of their report to the commissioner of

correction, as hereinbefore provided, and proceed to determine the amount of reduction of sentence which they shall allow to any prisoner, which shall not in any case exceed the amount fixed by this article. They shall have full discretion to withhold the allowance of reduction of sentence for good conduct and for efficient and willing performance of duties assigned, or of a part therefor, as a punishment for offenses against the discipline of the prison or penitentiary, in accordance with the rules hereinbefore mentioned. Reduction credited to a prisoner in the first instance, in his account, by the warden, as provided in section two hundred and thirty, shall stand as the reduction allowed, unless withheld wholly or partly by the board as punishment as above provided.

§ 236. Report when allowance withheld. —In all cases, however, where the board shall withhold the allowance of the whole or any part of reduction of sentence for good conduct and for efficient and willing performance of duties assigned, they shall forward with their report to the commissioner of correction their reasons in writing, for such disallowance. The action of the board in granting all withholding reductions shall be deemed a judicial function and shall not be reviewable if done according to law."